92-405

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

M & M REFORESTATION LIMITED, MICHAEL B. COOKE and MARLENE T. COOKE, PETITIONERS

V.

SAIF CORPORATION, JOE FERNANDEZ, JR., and STATE OF OREGON, DEPARTMENT OF INSURANCE & FINANCE, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

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August 24, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Whether, at a hearing on a proposed governmental taking of a citizen's property, due process of law requires the proponent of the taking to bear the burden of proving that the taking is justified.

2. Whether the definition of a due process "hearing" necessarily includes the allocation of burden of proof.

3. Whether an agency's bare allegation that one is a "subject employer," is sufficient under the due process clause to impose on the alleged employer the burden of proving that the allegation is incorrect.

PARTIES TO THIS PROCEEDING

All parties appear in the caption.

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Lavine v. Milne, 424 U.S. 577, 96 SCt 1010, 47 LEd2d 249 (1976) 17,18

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442 US 140, 156-57, 99 S Ct 2213,
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Constitutional and Statutory Provisions

United States Constitution
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Law Review Articles

Friendly, "Some Kind of Hearing,"
123 U. Pa. L. Rev. 1267, 1295
(1975) 17

REPORTS OF PROCEEDINGS BELOW

The administrative agency opinions were not reported. The Oregon Court of Appeals' decision is reported at 110 Or App 370, 821 P2d 1134 (1991). The Oregon Supreme Court's Order Denying Review was reported at 313 Or 299, __ P2d __ (1992).

BASIS FOR JURISDICTION

1. The Oregon Court of Appeals' decision sought to be reviewed was entered on December 11, 1991.

2. The Oregon Supreme Court's decision denying review was entered on May 26, 1992.

3. This Court's jurisdiction is conferred by 28 USC Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution Amendment XIV provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ORS 656.052(1) and (2) provide:

"(1) No person shall engage as a subject employer unless and until the person has provided coverage pursuant to ORS 656.017 for subject workers

the person employs.

(2) Whenever the director has reason to believe that any person has violated subsection (1) of this section, the director shall serve upon the person a proposed order declaring the person to be a noncomplying employer and containing the amount, if any, of civil penalty to be assessed pursuant to ORS 656.735(1)."

ORS 656.740(1) provides:

"A person may contest a proposed order of the director declaring that person to be a noncomplying employer, or a proposed assessment of civil penalty, by filing with the department, within 20 days of receipt of notice thereof, a written request for a hearing. Such a request need not be in any particular form, but

shall specify the grounds upon which the person contests the proposed order or assessment. An Order by the director under this subsection is prima facie correct and the burden is upon the employer to prove that the order is incorrect." (emphasis supplied)

ORS 656.054 is set out in the appendix at page App-24.

ORS 656.735 is set out in the appendix at page App-30.

STATEMENT OF THE CASE

Facts

Petitioners are part-time Christmas tree growers who need extra help during harvest. In 1988 petitioners hired a licensed labor contractor to provide short term workers, and also accepted help from friends and relatives. Claimant

Fernandez heard that work was available and came to petitioners' field, where he injured himself.

Oregon law requires certain employers to provide workers' compensation insurance for employees. The Oregon Department of Insurance & Finance issued a "Proposed and Final Order; Notice" stating in substance that:

"The Compliance Section has investigated and FINDS: the above-named employer was doing business as a corporation which employed subject workers from November 17, 1988 to November 18, 1988, and was a subject employer as defined by the Workers' Compensation law."

ORS 656.740(1), set out above, allows an alleged employer to contest

such an order, but provides that "the burden is upon the employer to prove that the order is incorrect."

Petitioners requested a hearing, denying that they ever hired the claimant. After taking testimony the referee concluded that "the employers have not met their burden of showing that the order of non-compliance was incorrect." (App-18) On review, the Oregon Workers' Compensation Board adopted the referee's findings and opinion.

The Oregon Court of Appeals affirmed the Board's decision without opinion, and the Oregon Supreme Court denied review.

As a consequence of the Board's order, petitioners are liable for compensation paid to the claimant, claimant's attorney fees, administrative

expenses, and a potential penalty. ORS 656.054 (App-24).

Stage at Which Federal Question Raised

Petitioners' argument that ORS 646.740(1) violates the due process clause, was presented to the Oregon Workers' Compensation Board, to the Oregon Court of Appeals, and to the Oregon Supreme Court.

Petitioners argued to the Workers' Compensation Board that:

> "The strict application of ORS 656.740(1), purporting to place the burden of proof on the alleged employer, is neither reasonable or constitutional. *** Based on this potentially scanty or even non-existent evidence, the State claims the authority to impose substantial penalties on a person alleged to be a noncomplying

employer. *** The State cannot present a citizen with a conclusory allegation and require him or her to disprove it. To do so violates the Oregon Constitution *** and the United States Constitution Amendments V and XIV." Brief of Alleged Noncomplying Employer, pp. 10-11.

Petitioners' assignment of error in the Court of Appeals was that "The Board erred in allocating the burden of proof to the alleged employer." (Appellants' Brief page 9). Petitioners argued that:

"The statute requires no particular degree of factfinding, and this record is devoid of any investigatory reports or other indicia that there was any rational factfinding process undertaken before the order was entered. *** The state is prohibited

from simply mailing to a citizen a conclusory allegation, and then requiring the citizen to disprove it. United States Constitution Amendments V and XIV." (App Br 10-11) See also App Br 2.

In their Petition for Review before the Oregon Supreme Court the petitioners argued that:

"The statute upon which this proceeding is based, ORS 656.740(1) is unconstitutional on its face and as applied in this case. That statute, and related ORS 656.052(2) violate the Due Process Clause of the 14th Amendment of the United States Constitution, by shifting the ultimate burden of proof as to the lawfulness of the proposed taking of one's property from the government to the individual whose property is

being taken." (Petition for Review, page 1)

REASONS FOR GRANTING THE WRIT

1. The Oregon Court of Appeals has decided an important question of federal law that conflicts with applicable decisions of this court.

A long line of due process cases has established that the government must justify before a neutral fact-finder its action depriving a citizen of liberty or property. See for example Morrissey v. Brewer, 408 US 471, 92 S Ct 2593, 33 L Ed2d 484 (1972), Cleveland Board of Education v. Loudermill, 470 US 532, 105 S Ct 1487, 84 L Ed2d 494 (1985), Brock v. Roadway Express, Inc. 481 US 252, 266, 107 S Ct 1740, 95 L Ed2d 239 (1987), Ulster County Court v. Allen, 442 US 140, 156-57, 99 S Ct 2213, 60 L Ed2d 777 (1979), Goss v. Lopez, 419 US 565, 95 S Ct

729, 42 L Ed2d 725 (1975).

If a legislature may simply reverse the ultimate burden of persuasion, then the holdings of these cases are vitiated. In Morrissey v. Brewer, supra., 408 U.S. at 484, for example, the court stated that:

> "What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts ***" (emphasis supplied)

At the hearing, the constitutional requirement is clearly for a finding of a violation, i.e., an affirmative burden on the state.

If the reversed burden of persuasion approved by the Oregon court is indeed constitutional, then a state could imprison an alleged parole or probation violator unless that person

proved he did not violate the terms of his release. A school district could expel a student without proving inappropriate behavior; rather the student would have to prove that she should not be expelled (Goss v. Lopez, supra., 419 U.S. 565) Likewise a public employee could be fired without proof of misconduct. (Loudermill) A city could establish a traffic bureau with authority to impose fines unless an accused driver proved that he or she did not commit an alleged violation. The decision below turns traditional notions of fairness on their heads.

2. The Oregon court has decided an important question of federal law which has not been, but should be, settled by this court.

This case involves issues arising from the intersection of three areas of

the law -- burden of proof, presumptions, and due process -- that are often confusing and have not always been dealt with consistently by this court. This case offers an opportunity to clarify due process analysis and establish a cohesiveness among disparate cases.

The present situation does not require the thorny balancing test that arises when evaluating the due process requirements for a pre-termination as opposed to a post-termination hearing. See for example Loudermill, supra. The case also presents a plain issue of "deprivation" as opposed to "entitlement." See for example Lavine v. Milne, 424 U.S. 577, 96 SCt 1010, 47 LEd 2 249 (1976). See also Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1295 (1975).

The usefulness of clarification

of the law is apparent from dictum in the case of Lavine v. Milne, supra., 424 U.S. 577, 585, where Justice White stated that:

> "Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of constitutional moment."

It is apparent from the context that the court was merely affirming that an applicant for social welfare benefits can be required to prove all conditions of entitlement. The statement also refers to true evidentiary presumptions, which are not directly involved in the present case. Plainly, the literal application of the comment would contradict the court's holdings in Goss, Loudermill, Morrissey, etc. The present case offers the opportunity to refine the

distinctions between the burden of going forward with the evidence versus the ultimate burden of persuasion in the context of a taking.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Oregon Court of Appeals.

Respectfully submitted,

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DECISION OF COURT OF APPEALS

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

CA A67569

In the Matter of the Compensation of Joe Fernandez, Jr., Claimant,

and

In the Matter of the Complying Status of M & M Reforestation Limited, Michael B. Cooke, Individually and Marlene T. Cooke, Individually, Employer.

M & M REFORESTATION LIMITED, MICHAEL B. COOKE and MARLENE T. COOKE,

Petitioners,

v.

SAIF CORPORATION and JOE FERNANDEZ, JR.,

Respondents.

AFFIRMED WITHOUT OPINION

Filed: December 11, 1991

OPINION OF WORKERS' COMPENSATION BOARD

BEFORE THE WORKERS' COMPENSATION BOARD
OF THE STATE OF OREGON

WCB Case No. 89-06549
WCB Case No. 89-06550

In the Matter of the Compensation of JOE FERNANDEZ, JR., Claimant and In the Matter of the Complying Status of M & M REFORESTATION LIMITED, Michael B. Cooke, Individually and Marlene T. Cooke, Individually, Employer

ORDER ON REVIEW

Reviewed by Board Members Howell and Speer.

The alleged noncomplying employer, M & M Reforestation, requests review of those portions of Referee Garaventa's order that: (1) found that claimant was a subject worker' and (2) affirmed the Director's Proposed and Final Order finding it to be a noncomplying employer. On review, the issues are jurisdiction, subjectivity and

compensability. We affirm.

FACTS

We adopt the Referee's "Basic Facts" and "Ultimate Facts," with the following supplementation.

THe SAIF Corporation accepted claimant's claim on March 8, 1989. (Ex. 7-1). The alleged noncomplying employer requested a hearing regarding both SAIF's acceptance and the Director's proposed order, No. 1385-A, finding the employer to be noncomplying. (Ex. 7-3).

A hearing was held and evidence taken regarding the employer/employee relationship. The alleged employer raised compensability as an issue. (1 Tr. 9). The Referee concluded that compensability ceased being an issue on the second day of hearing. At that time, the alleged employer "conceded" that the claim is compensable, <u>if claimant is</u>

determined to be a subject employee. (2 Tr. 3). We conclude that the employer neither intended to, nor did in fact, concede compensability, because only subject workers may suffer injuries which are compensable under Worker's Compensation Law. ORS 656.005(26) and 656.027.

CONCLUSIONS OF LAW AND OPINION

Jurisdiction

The alleged employer raised the compensability issue at hearing and in its brief to the Board. Consequently, our jurisdiction is evoked on review. ORS 656.740(4)(c).

Subjectivity

We adopt the Referee's "Conclusions and Opinion" regarding this issue, with the following supplementation.

The alleged employer ratified

Steve Fernandez' apparent authority to act in its stead for hiring purposes, when Mike Cooke, owner and manager, admitted that he was glad to have claimant's help. (1 Tr. 36). Cooke delegated further authority to Fernandez, when he directed him to show claimant "what to do." (2 Tr. 28). For these reasons, as well as those discussed by the Referee, we are persuaded that an employment relationship existed between the alleged employer and claimant. We conclude that claimant is a "subject worker." ORS 656.005(26).

Compensability

The employer conceded that claimant's claim is compensable if claimant is a subject worker. Therefore, inasmuch as we have determined that claimant is a subject worker, we also find that his claim is compensable.

Claimant is statutorily entitled to a reasonable assessed fee for his counsel's services on Board review. After considering the factors set forth in OAR 438-15-010(4) and applying them to this case, we find that a reasonable fee for claimant's counsel's services on review is $700, to be paid by SAIF on behalf of the noncomplying employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief) and the complexity of the issues.

ORDER

The Referee's order dated September 25, 1989 is affirmed. Additionally, the SAIF Corporation's acceptance of claimant's injury claim is upheld and the case is remanded to SAIF for further processing consistent with

this order. Claimant's attorney is awarded a reasonable assessed fee for his services on review of $700, to be paid by the SAIF Corporation on behalf of the noncomplying employer.

***

Entered at Salem, Oregon and copies mailed.

***

Nov 06 1990

WORKERS' COMPENSATION BOARD
/s/ John M. Howell
John M. Howell, Board Member

/s/ Homer A. Speer, Jr.
Homer A Speer, Jr., Board Member

REFEREE'S OPINION

BEFORE THE WORKERS' COMPENSATION BOARD
STATE OF OREGON
HEARINGS DIVISION

WCB Case No. 89-06549
WCB Case No. 89-06550

In the Matter of the Compensation of
JOE FERNANDEZ, JR., Claimant
and
In the Matter of the Complying Status of

M & M REFORESTATION LIMITED, Michael B. Cooke, Individually and Marlene T. Cooke, Individually.
Employer

OPINION AND ORDER

ISSUES

1. The non-complying employer challenges the December 30, 1988 Order of Noncompliance.

2. The non-complying employer seeks attorney fees under ORS 656.740 against the Department of Insurance and Finance should the order of noncompliance be set aside.

3. Claimant seeks attorney fees against SAIF Corporation for efforts relating to the compensability issue which was not conceded until the hearing.

FINDINGS OF FACT

Basic Facts

M & M Reforestation is a 21-acre Christmas Tree farm owned by Jim [sic] and Marlene Cooke. The business has no workers' compensation coverage. The work is done by family and friends who volunteer, by employees of a labor contractor who maintains coverage on its employees, and occasionally by others who are needed to help prepare the soil, apply chemicals to the trees and ground, plant seedlings, trim the trees, and harvest the trees for market. Marlene Cooke handles the arrangements for getting workers through J & J Contractors, the labor contractor, and

for paying the workers.

Jim Selmer is Marlene Cooke's brother. He does not have a full-time job, but does odd jobs and helps out at the tree farm when needed. He hired and directly paid Steve Fernandez, a friend, to work on the farm. Steve understood that he worked for the Cooke's, who owned the farm. Jim Selmer's girlfriend, Melinda, recruited other workers, including claimant, but there was no discussion as to who would pay for their services. Steve Fernandez called his brother, the claimant, when Melinda approached him to ask if he knew of anyone who would like to help out during the harvest. Claimant agreed to work and was told by his brother that he would receive the same wages as he.

Claimant worked on November 17, 1988, at the farm, during which time he

injured his back. Steve had introduced him to Mike Cooke in the morning, but the contact at that time was minimal. Mike Cooke told Steve to show claimant what to do.

Claimant did not work at the farm after that day, but sought medical treatment the following day, and a claim was filed on his behalf by the medical provider.

Claimant returned to the Cooke's home approximately one week later to collect his pay. He first approached Mike, who was in the shop, but was told to go to the house where his wife would handle it. Claimant then walked the short distance to the house where he asked Marlene for his pay. Marlene paid claimant $45 and marked his name off of a written list she held.

Jim Selmer directed the business

operations when Mike Cooke, his brother-in-law, was not present.

The Cooke's paid labor costs of more than $200 in one 30-day period for work done at M & M Reforestation.

The order of noncompliance issued December 30, 1988, and the claim was referred to SAIF for processing. The Cooke's timely requested a hearing on the order.

Ultimate Facts

There were implied contracts of hire between the Cooke's and Steve Fernandez and between the Cooke's and the claimant.

CONCLUSIONS AND OPINION

ORS 656.740(1) provides that an order of the director declaring a person to be a non-complying employer is prima facie correct and the burden is upon the employer to prove that it was not a

subject employer. The December 30, 1988 order of noncompliance in this case is prima facie correct and it is the Cooke's burden to establish that it is incorrect.

ORS 656.023 identifies a subject employer as an employer employing one or more subject workers in the state. All workers are subject workers, except for those meeting exceptions set forth in ORS 656.027, one of which includes casual employment. ORS 656.027 defines casual employment as labor costs of less than $200 in any 30-day period.

The pivotal question in this case is whether there was a contract of hire, either express or implied, between the Cooke's and any workers on the farm. Hix v. SAIF, 34 Or App 819 (1978).

The Cooke's argue that their corporation hired no employees so as to require it to obtain workers'

compensation coverage. They argue that all work done for the corporation was performed gratuitously by family and friends and by subcontracting through a labor contractor which itself maintained coverage on its employees. The subcontracting was done, according to the Cooke's, in order to avoid the necessity of dealing with payroll and workers' compensation insurance coverage.

The Cooke's were aware that coverage was necessary if they were to hire workers directly. They had previously had coverage, but let it lapse when they decided to acquire labor through a labor contractor. The financial records on the farm's business operation are not organized or complete. The Cooke's did not file an income tax return for the year 1988 because the expenses far exceeded the gross income.

Although I understand the Cooke's desire to circumvent the requirement of obtaining workers' compensation insurance coverage, their are a few things that suggest to me that they have not actually succeeded in insulating themselves from the requirement. I do not accept their contention that they did not intend to employ workers other than those obtained through J & J Labor Contractors.

It is uncontroverted that Steve Fernandez was paid at least $235 for his work at the farm. The Cooke's maintain that they did not know that Jim was paying Steve to work on the farm. No one explained, however, including Jim, why he would pay someone to work on the farm when he had no financial interest in the operation. Neither did anyone explain where Jim, who had no regular employment, got the money to pay Steve to work on his

sister and brother-in-law's farm.

The employer's argument that the services performed by Steve and Joe Fernandez were gratuitous is not persuasive. First, the two were actually paid for their services. Second, all cases cited by the employer finding services to be so classified involve close family members helping relatives in their capacity as owners or employees. Here, Steve and Joe Fernandez were not relatives of Jim Selmer or of the Cooke's. The Cooke's did not even know Joe, and I do not believe that they could reasonably believe that strangers would offer services without expecting payment.

I find that Jim Selmer and his girlfriend had, at least, apparent authority to hire employees for M & M Reforestation. I find that they exercised that authority and entered into

contracts of hire with Steve Fernandez and Joe Fernandez to work at M & M Reforestation.

I further find that the employer's argument that any employment on the farm was casual is without merit. The labor costs exceeded $200 in any one month.

The Cooke's cannot avoid responsibility by delegating the requirement of recruiting workers to someone who appeared to be detached from the business, by keeping incomplete and disorganized records, and by pleading ignorance. They needed the work to get done on the farm and they paid for the labor costs. Some of the labor was performed by a subcontractor who maintained insurance on its employees. Other paid labor was performed by employees hired by someone with authority

to hire.

I conclude that the employers have not met their burden of showing that the Order of Noncompliance was incorrect.

Attorney Fees

Because the Order of Noncompliance is affirmed, the employer is not entitled to attorney fees under ORS 656.740.

Claimant's attorney is not ordinarily entitled to attorney fees in cases in which claimant's right to compensation or the amount thereof is not in issue. In this case, the sole issue involved the employer's challenge of the Department's Order of Noncompliance. Until the commencement of the second day of hearing, however, the issue of compensability was at issue. Claimant's attorney prepared and litigated that issue through the first day of the

hearing. I conclude that he is entitled to a fee for services performed on that issue until the date that it was conceded by the employer.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The December 30, 1988 Order of Noncompliance is affirmed.

2. Considering the Statement of Services, together with the factors set forth in OAR 438-15-010(6), SAIF Corporation shall pay to claimant's attorney $1,000 pursuant to its obligation under ORS 656.054, for his efforts prior to the employer's concession of the compensability issue.

***

ENTERED at Salem, Oregon on Sep 25 1989 and copies mailed on said date.

***

WORKERS' COMPENSATION BOARD
By /s/ Donna Garaventa
Donna Garaventa
Referee

PROPOSED AND FINAL ORDER; NOTICE

IN THE MATTER OF THE COMPLIANCE)
)
of)
)
M & M REFORESTATION LIMITED,)
Employer)

TO: M & M Reforestation Limited,
Michael B Cooke, and
Marlinee [sic] T Cooke

An employer who is subject to the Workers' Compensation Law is required by ORS 656.017 to provide workers' compensation coverage for subject workers.

The Compliance Section has investigated and FINDS:

The above named employer was doing business as a corporation which employed subject worker(s) from November 17, 1988 to November 18, 1988 and was a subject employer as defined by the Workers' Compensation Law; and Joe Fernandez, Jr., claimant was a subject employe on November 17, 1988.

According to the records of the Workers' Compensation Division the above named employer did not meet the requirements of ORS 656.017, either as a carrier-insured employer or a self-insured employer during said period of employment.

Therefore, an ORDER is hereby entered Declaring: M & M Reforestation Limited a Noncomplying Employer, as defined by the Workers' Compensation Law, from November 17, 1988 to November 18, 1988, and Joe Fernandez, Jr. was a subject employe on November 17, 1988.

***

Dated this 30th day of December, 1988.

DEPARTMENT OF INSURANCE & FINANCE

SUPREME COURT'S
ORDER DENYING REVIEW

IN THE SUPREME COURT
OF THE STATE OF OREGON

CA A67569
SC S38836

M & M REFORESTATION LIMITED	)
Petitioner/Petitioner	)
MICHAEL B COOKE	)
Petitioner/Petitioner	)
MARLENE T COOKE	)
Petitioner/Petitioner	)
	)
v.	)
	)
SAIF CORPORATION	)
Respondent/Respondent	)
JOE FERNANDEZ JR	)

ORDER DENYING REVIEW

The Court has considered the petition for review and orders that it be denied.

DATE: May 26, 1992.

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

ORS 656.054 provides:

"(1) A compensable injury to a subject worker while in the employ of a noncomplying employer is compensable to the same extent as if the employer had complied with this chapter. The director shall refer the claim for such an injury to the State Accident Insurance Fund Corporation within 60 days of the date the director has notice of the claim. At the time of referral of the claim, the director shall notify the employer in writing regarding the referral of the claim and the employer's right to object to the claim. A claim for compensation made by such a worker shall be processed by the State Accident Insurance Fund Corporation in the same manner as a claim made by a worker employed by a carrier-insured employer, except that the time within which the first installment

of compensation is to be paid, pursuant to ORS 656.262(4), shall not begin to run until the director has referred the claim to the State Accident Insurance Fund Corporation. At any time within which the claim may be accepted or denied as provided in ORS 656.262, the employer may request a hearing to object to the claim. If an order becomes final holding the same to be compensable, the employer is liable for all costs imposed by this chapter, including reasonable attorney fees to be paid to the worker's attorney for services rendered in connection with the employer's objection to the claim.

(2) Whenever a subject worker suffers a compensable injury while in the employ of a noncomplying employer, the director shall, after an order closing the claim has become final, serve upon the employer a notice of proposed penalty to be

assessed pursuant to ORS 656.735(3).

(3) In addition to, and not in lieu of, any civil penalties assessed pursuant to ORS 656.735, all costs to the Industrial Accident Fund of a claim processed under subsection (1) of this section shall be a liability of the noncomplying employer. Such costs include compensation, reasonable administrative costs and any attorney fees awarded to the claimant, but do not include assessments for reserves in the Insurance and Finance Fund. The director shall recover such costs from the employer. The director shall provide by regulation for the Insurance and Finance Fund to reimburse, on a periodic basis, the Industrial Accident Fund for any costs it incurs under this section. When the director prevails in any action brought pursuant to this subsection, the

director is entitled to recover from the noncomplying employer court costs and attorney fees incurred by the director.

(4) Periodically the director shall audit the files of the State Accident Insurance Fund Corporation to validate the amount reimbursed pursuant to subsection (3) of this section. Reimbursement shall not be allowed, if upon such audit, any of the following are found to apply:

(a) Compensation has been paid as a result of untimely, inaccurate, or improper claims processing;

(b) Compensation has been paid negligently for treatment of any condition unrelated to the compensable condition;

(c) The compensability of an accepted claim is questionable and the rationale for acceptance has not been

reasonably documented in accordance with generally accepted claims management procedures;

(d) The separate payments of compensation have not been documented in accordance with generally accepted accounting procedures; or

(e) The payments were made pursuant to a disposition agreement as provided by ORS 656.236 without the prior approval of the director.

(5) The State Accident Insurance Fund Corporation may appeal any disapproval of reimbursement made by the director under this section pursuant to ORS 183.310 to 183.550 and such procedural rules as the director may prescribe."

ORS 656.735 provides:

"(1) The director may assess any person who violates ORS 656.052(1) a civil penalty of not more than $1,000.

(2) The director may assess any person who continues to violate ORS 656.052(1), after an order issued pursuant to ORS 656.052(2) has become final, a civil penalty, in addition to any penalty assessed under subsection (1) of this section, of not more than $25 for each day such violation continues.

(3) In addition to any other penalties assessed under this section, where a subject worker receives a compensable injury while in the employ of a noncomplying employer, the director shall assess such employer a civil penalty of not less than $100 and not more than:

(a) $500 if the worker suffers no disability;

(b) $1,000 if the worker suffers a temporary disability;

(c) $2,500 if the worker suffers a permanent partial disability; or

(d) $5,000 if the worker dies or suffers permanent total disability.

(4) When a noncomplying employer is a corporation, such corporation and the officers and directors thereof shall be jointly and severally liable for any civil penalties assessed under this section and any claim costs incurred under ORS 656.054.

(5) When an order assessing a civil penalty becomes final by operation of law or on appeal, unless the amount of penalty is paid within 10 days after the order becomes final, it constitutes a judgment and may be recorded with the county clerk in any county of this state. The clerk shall thereupon record the name

of the person incurring the penalty and the amount of the penalty in the County Clerk Lien Record. The penalty provided in the order so recorded shall become a lien upon the title to any interest in property owned by the person against whom the order is entered, and execution may be issued upon the order in the same manner as execution upon a judgment of a court of record.

(6) Civil penalties, and judgments entered thereon, due to the director under this section from any person shall be deemed preferred to all general claims in all bankruptcy proceedings, trustee proceedings, and proceedings for the administration of estates and receiverships involving the person liable therefor or the property of such person.

(7) All moneys collected under this section shall be paid into the Insurance

and Finance Fund."